82-1168

No.

Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE," a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Brief of Respondents Frederick S. Feiner, Alan L. Rubenstein, Ira S. Rubenstein, Fred S. Levinson, Individually and as Co-Partners, and Middletown OBS-GYN Associates, P.C., in Opposition to Petitioners' Petition for a Writ of Certiorari

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Questions Presented.

1. Is it tampering to verify the factual testimony of the opposing party's expert concerning his credentials?

2. Is it a violation of due process of law when the Trial Court denied plaintiffs' motion for a mistrial and application that the alleged tampering be brought before the jury after a full hearing wherein it found that the efforts of the defense were merely to check the credentials of the plaintiffs' expert obstetrician who lied about his credentials in his testimony?

3. Does the allegation of violation of due process based upon a claim of tampering with a witness which was found by the trial judge to have no basis, which determination was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department with leave to further appeal denied by the New York State Court of Appeals, raise a substantial federal question such that review by this Court is merited?

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OCTOBER TERM, 1982.

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Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "John Doe," a partnership, said name "John Doe" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P. C.,

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Statement of the Case.

In this medical malpractice action the plaintiffs claim that the infant, Frank Monaco, was injured as a result of the negligence of the defendant obstetricians, Feiner, A. Rubenstein, I. Rubenstein and Levinson, in a pre-delivery obstetrical care rendered to the infant's mother, and that the pediatrician, defendant Rohatgi, was negligent in his pediatric care of the infant. The trial of the action took over two months. During the trial, expert testimony was presented on behalf of both the plaintiffs and the defendants with regard to the quality of the obstetrical and pediatric care. Of great significance is that the infant's treating physicians, Dr. Lester Mermell, an ophthalmologist, and Dr. Myles Behrens, a neuro-ophthalmologist, both testified that plaintiff's blindness was caused by a congenital malformation of the optic nerves which occurred during the first several months of pregnancy (2321, 2330, 2354-55, 2356, 2391-93, 2401-04, 2422).[1] Dr. Arnold Gold, who treated the infant at Columbia Presbyterian Hospital, diagnosed the baby as having a congenital defect (2229, 2392, 2401-02). Dr. Joseph Schnur, a neuro-radiologist, confirmed that the defect was congenital from CAT scans that were taken of the baby at Columbia Presbyterian (2460).

During the trial, the Court dismissed the obstetrical claims except for those against defendant, Ira Rubenstein,

[1]References are to the transcript of the trial.

which were submitted to the jury along with the claims against the pediatricians. The jury returned a unanimous verdict in favor of the remaining defendants.

The determination was appealed to the Appellate Division of the Supreme Court, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion. Plaintiffs' motion to the Appellate Division for renewal and for leave to appeal to the New York State Court of Appeals was denied. Plaintiffs' motion to the Court of Appeals for leave to appeal to that Court was also denied.

Summary of Argument.

During the course of the trial of the subject case, petitioners presented an expert witness who testified as to his credentials and to the merits of the case. Respondents investigated the witness' stated credentials, and found that he had made several untrue statements, a fact which he admitted on later cross examination. Petitioners have attempted to characterize respondent's investigation of their witness as tampering in order to offset damage done by the unmasking of their expert, but in fact neither the Trial Court nor the Appellate Courts of New York found any evidence of impropriety by respondents.

Petitoners' present application for certiorari speaks of this alleged tampering as if it were accomplished fact in order to reach a spurious constitutional ground for certiorari. The issue herein is not one of constitutional import, but rather goes to whether an evidentiary question was correctly decided. Because there is no federal question here, a grant of certiorari would be inappropriate.

In addition, there is no special and important reason for certiorari here. There is no issue of national scope, no result in conflict with this or other courts, no federal question ripe for resolution. There is no evidence to show impropriety in the lower Court's determination. There is no basis for a grant of certiorari in this case.

POINT I.

There was no tampering in this case.

The petitioners' application for certiorari to this Court is based upon the *assumption* that there was tampering with their obstetrical expert, Dr. Sherman. There was no tampering with this witness. The simple truth is that this expert witness lied about his credentials, and was caught when the credentials were checked out by the defense. Yet, the plaintiffs have the temerity to continue to contend that the defense efforts to ascertain the real truth concerning this witness constitutes tampering, notwithstanding that neither the Trial Court nor the Appellate Division of the Supreme Court of the State of New York found any basis for the claim.

Dr. Sherman was plaintiffs' principal obstetrical expert against the defendant obstetricians. His credentials were thus of significant importance. On direct examination, Dr. Sherman testified that he was presently teaching on the teaching faculty of the New York University School of Medicine and had been teaching obstetrics and gynecology since 1964:

> "QUESTION: Doctor, are you on a teaching faculty?
>
> ANSWER: Yes, sir. I am on the faculty of New York University School of Medicine.

QUESTION: And you have been connected on the faculty for how long now?

ANSWER: Since 1964.

QUESTION: And your subject matter in connection with that teaching is what?

ANSWER: Obstetrics and gynecology" (1127).

On cross, Dr. Sherman again testified regarding his teaching position at the Hospital:

"QUESTION: Doctor, you testified this morning, I believe, that you are on the teaching staff of New York University Hospital; is that correct?

ANSWER: That's correct" (1151).

In addition, on cross Dr. Sherman testified that he participated in approximately 100 obstetrical deliveries on his own patients during the year 1954:

"QUESTION: You have done deliveries; correct?

ANSWER: That's correct.

QUESTION: How many deliveries did you do last year, the year 1978?

ANSWER: I don't have my records with me.

QUESTION: Well, how about approximately?

ANSWER: 100.

QUESTION: Are they your own patients, doctor, or are they service patients?

ANSWER: They are my own patients" (1154).

Further, Dr. Sherman testified that the teaching staff at the University Hospital would have done things differently than did the defendant obstetricians:

"QUESTION: Are you saying that that is the opinion of the teaching staff of University Hospital to do an immediate section under those circumstances you saw at 7:00?

ANSWER: I would say, yes" (1156-1157).[2]

During cross examination, plaintiffs' counsel moved for a mistrial on the grounds that the defense had contacted University Hospital in connection with Dr. Sherman's testimony. The trial was suspended and a hearing was held in chambers, during which testimony was taken from Drs. Sherman and Feiner in connection with the claim. The substance of what transpired is as follows.

Defense counsel Ryan advised the Court that during Dr. Sherman's testimony he had telephoned Dr. Morris, the Assistant Chief of Obstetrics and Gynecology at University Hospital,to inquire into Dr. Sherman's qualifications and credibility, as the Directory of Medical Services listed Dr. Sherman as last teaching in 1964. Dr. Morris advised Mr. Ryan that Dr. Sherman did not have a teaching position (1241-42).

Dr. Sherman's credibility was now seriously in doubt. Dr. Feiner testified that he spoke to two University Hospital staff physicians whom he knew to ascertain the truth of Dr. Sherman's testimony. Principally, Dr. Feiner was interested in Dr. Sherman's testimony that he held a teaching position at the Hospital and had performed 100 deliveries in the prior year. Dr. Feiner ascertained from their doctors that the most deliveries Dr. Sherman could have performed during the prior year was 20 to 30. They suggested that Dr. Feiner call Dr. Morris who could give

[2]It was Dr. Sherman's opinion that the obstetrician should not have performed an amniotomy, and should have performed a Caesarean section immediately thereafter.

accurate information on a number of deliveries and Dr. Sherman's teaching position (1280-94).

Dr. Feiner did call Dr. Morris. He didn't ask Dr. Morris if he could help him (1938). He didn't ask Dr. Morris to speak to Dr. Sherman (1303, 1941). He didn't ask Dr. Morris to do anything other than to give information concerning the number of deliveries by Dr. Sherman the prior year, and the status of his teaching position (1303, 1942). In fact, Dr. Feiner did not speak to any doctors at the University Hospital to try to affect Dr. Sherman's testimony as a witness. Rather, he simply wanted to find out about the volume of Dr. Sherman's work and his teaching status (1951).

Dr. Morris checked the records and found that Dr. Sherman did not perform 100 deliveries the prior year, but closer to 20. He also told Dr. Feiner that Dr. Sherman did not have any formal teaching assignment at the Hospital (1295-97, 1301, 1939-40, 1947).

Dr. Sherman testified at the hearing that he spoke to Dr. Morris who was not critical of his opinion, but did disagree regarding his testimony as to the proper management of obstetrical patients (1261). In view of their differences of opinion, Dr. Morris cautioned Dr. Sherman that he should not represent that his opinion was that of the teaching staff of the Hospital as he had previously testified. Dr. Sherman said that while he experienced some "flack" over the matter, he was not afraid he would lose his privileges (1254-1261, 1277).

The Trial Judge found that there was absolutely no evidence that there was any effort to seek, persuade or otherwise induce the doctors at the University Hospital to

affect the testimony of Dr. Sherman (1954), that there was nothing to indicate that anyone had interceded with Dr. Morris to bring about any change in his testimony (1306), and that, while Dr. Sherman testified that he did expect some "flack," "he was prepared to proceed in accordance with whatever his testimony would otherwise have been" (1305). The Court denied the motion for a mistrial (1307) and plaintiffs' application that this matter be brought before the jury (1954).[1]

When testimony resumed before the jury, Dr. Sherman admitted that he was incorrect when he testified that he performed approximately 100 deliveries, and conceded that he actually performed 10 to 20 in the prior year (1323-1324). Although he was argumentative, he finally admitted that he had no teaching assignment at the Medical School (1334). He also admitted that it was not the teaching of the University Hospital not to do an amniotomy under the circumstances, and that at least one doctor at the Hospital would have done an amniotomy (1326-1327).

Further, there was no effect on Dr. Sherman's testimony other than his admitting the truth. He testified that he was prepared to go forward with his testimony. Notwithstanding petitioners' protestations to the contrary, Dr. Sherman steadfastly adhered to his opinion that there was malpractice in the obstetrical care (1368-71, 1377-78, 1414-16, 1434-35, 1449-50, 1457).

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[1]We take strong issue with the petitioners' alleged quote of the Trial Court at page four of their brief that, "Disciplinary action may well be in order." There is no such statement by the Court at the cited page, nor is there any such statement in the record. This "phantom" quote is highly representative of plaintiffs' attempt at trial, before the New York Appellate Courts, and now before this Court to feign an issue of tampering which, in truth, does not exist.

It is fundamental that any witness who assumes the stand places his credibility in issue and may be impeached by evidence of any fact which is contrary to the witness' testimony. A trial, after all, is a legitimate search for the truth. The plaintiffs' witness made misstatements under oath. The defendants were entitled to delve into the factual contentions of plaintiffs' principal obstetrical witness, and to learn the truth from whatever source was appropriate. It is unthinkable that the law should intend that the credentials of a supposed expert should go unchallenged. Indeed, in *Trapp v. American Trading & Production Corp.*, 66 A.D.2d 515, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, set aside a verdict when it was discovered *after the trial* that an expert lied about his qualifications.

The cases upon which petitioners rely are not at all in point. They all involve situations where there was a direct effort to coerce a witness to either change or suppress evidence. This is not the situation in the case at bar. Nor is there relevance to §215.10 of the New York Penal Code. In point of fact, there has not nor could there be any proceeding against the respondents under this statute.

In sum, there was nothing more done in this case than in any case where a witness' credentials are suspect. The plaintiffs themselves admit in their brief that the credibility of witnesses was most important. The jury was entitled to know the truth about Dr. Sherman's credentials, and the misrepresentations he made in his initital testimony. There was no tampering in the case at bar, and thus no violation of any of petitioners' rights by reason of the Court's refusing to grant a mistrial and refusing to allow the plaintiffs to bring their claim of tampering before the jury.

POINT II.

Certiorari should be denied because the issue involves, essentially, an evidentiary ruling by the Trial Court.

The major contention of the petitioners is that the Trial Court's refusal to allow them to present their evidence of alleged tampering to the jury denied them due process of law. The fact is that the Trial Judge made an evidentiary ruling which was within his judicial discretion, and which has been affirmed by the Appellate Division of the Supreme Court of the State of New York. This Court has stated that a petition for a writ of certiorari will not be granted to review evidentiary questions (*General Talking Pictures Corp. v. Western Electro Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L. Ed. 1273 [1937]).

Compelling authority against the granting of certiorari in this case is found in *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918). There, Mr. Justice McReynolds writing for the Court stated that a writ of certiorari was improperly granted where the question raised by the petitioners was whether the Trial Court erred in refusing to submit an evidentiary question to the jury. The Court dismissed the appeal finding that, "The propriety of submitting these matters depended essentially upon an appreciation of the evidence" (*Houston Oil v. Goodrich*, 245 U.S. 440, 441, 38 S.Ct. 140, 62 L.Ed. 385 [1918]).

The same is time for the case at bar. Precedent indicates that such a question is not a proper subject for Supreme Court review. Thus, respondents respectfully submit that petitioners' petition for a writ of certiorari should be denied.

POINT III.

There is no basis for this Court exercising its discretion in favor of certiorari.

The granting of certiorari is a discretionary act. Historically, the substantial federal question must be involved in order for certiorari to be allowed. The petitioners claim that the federal question involved is one of due process and the right to a fair trial. It is not without significance that although this case has wended its way through a Trial Court, and through Appellate Courts of the State of New York, petitioners have never before contended that there has been a constitutional violation of a due process right. One naturally concludes that the due process claim has been contrived to suggest a constitutional violation which, in reality, does not exist.

Rule 17 of the Rules of this Court requires "special and important reasons." There are no such reasons in the case at bar. Indeed, none of the considerations for granting certiorari mentioned in Rule 17 are present in this matter. The determination that there was no tampering with plaintiffs' obstetrical witness does not conflict with any decisions of this Court, nor with decisions of other state courts or federal courts of appeals. There is no reason why the issue should be addressed by this Court. Indeed, there is no federal question involved but rather an evidentiary determination by the Trial Court (see Point II, *supra*).

In addition, there is no reason why this case should be addressed by this Court. The evidentiary question raised by petitioners has no national import. Rather, the evidentiary decision of the Trial Judge has significance only to the parties to this litigation.

Even if this Court were to grant certiorari in this case, there is every likelihood that the decision of the Trial Court would be sustained. The Appellate Division of the Supreme Court of the State of New York has affirmed the decision. The Court of Appeals has denied petitioners' motion for leave to appeal to that Court, impliedly determining that there are no issues warranting that Court's review. Indeed, the Trial Judge's decision is supported by the overwhelming evidence. There was no attempt to tamper or alter the witness' testimony. The defense was entitled to investigate the credentials of plaintiffs' expert witness. The jury was entitled to know the truth about Dr. Sherman's credentials, and the misrepresentations in his testimony. Petitioners' brief advances no argument to suggest that further review by this Court would net any different result.

In sum, petitioners have failed to raise a question which merits review by this Court. There is no federal question, nor any special or important reason for granting certiorari. The issue is purely an evidentiary question. It is respectfully submitted that for all of these reasons, the petition for certiorari should be denied.

CONCLUSION.

Petitioner has shown no proper basis for a grant of certiorari in this case.

Respectfully submitted,

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